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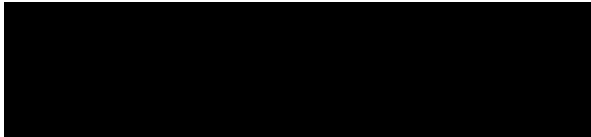
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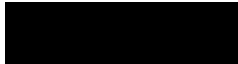


U.S. Citizenship
and Immigration
Services

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Office: BALTIMORE, MARYLAND Date:

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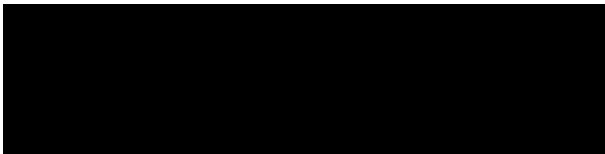
Applicant:



APPLICATION:

Application to Register Permanent Residence or Adjust Status (Form I-485) Pursuant
to Section 245 of the Immigration and Nationality Act, 8 U.S.C. § 1255

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The district director denied the Application to Register Permanent Residence or Adjust Status (Form I-485) on February 11, 2003. On April 29, 2003, the district director certified this decision to the Administrative Appeals Office (AAO) for review. The district director's decision will be withdrawn and the matter remanded for entry of a new decision.

The applicant is a native and citizen of India who seeks to adjust his status based upon an approved I-140 petition that the petitioner [REDACTED] on his behalf. The applicant is seeking to adjust his status as a skilled worker pursuant to section 203(b)(3) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3).

The district director denied the application because the applicant did not intend to work in Waltham, Massachusetts, the place of intended employment stated on the Application for Alien Employment Certification (Form ETA 750).

On notice of certification, neither counsel, the petitioner, nor the applicant submits evidence.¹

Section 245(a) of the Act, 8 U.S.C. § 1255(a), provides:

The status of an alien who was inspected and admitted or paroled into the United States or the status of any other alien having an approved petition for classification under subparagraph (A)(iii), (A)(iv), (B)(ii), or (B)(iii) of section 204(a)(1) or may be adjusted by the Attorney General [now the Director, Citizenship and Immigration Services (CIS)], in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if:

- (i) the alien makes an application for such adjustment,
- (ii) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
- (iii) an immigrant visa is immediately available to him at the time his application is filed.

The record contains a Form ETA 750 that the Department of Labor approved on June 1, 2001. According to this form: the name of the employer is [REDACTED] Inc.; the job title is software engineer; and the place of intended employment is Waltham, Massachusetts. The Form ETA 750, which was filed with the Department of Labor on October 24, 2000, lists the applicant's address in Waltham, Massachusetts. The I-140 petition that [REDACTED] on behalf of the applicant was approved on September 13, 2001. It also lists the applicant's address in Waltham, Massachusetts, although the street address is different from that listed on the Form ETA 750.

¹ The AAO notes that the February 11, 2003 denial letter and the April 29, 2003 certification notice contain many of the same assertions and conclusions, with only slight variations. In discussing the district director's decision, the AAO will refer to the April 29, 2003 certification notice, which is the reason why this decision is before the AAO at this time.

In an undated Notice of Intent to Deny, the district director informed the applicant that he was seeking to deny the I-485 application. Citing *Matter of Sunoco*, 17 I&N Dec. 283 (BIA 1979), the district director asserted that a Form ETA 750 is valid only for a particular job opportunity and for the area of intended employment as stated on the ETA 750. According to the district director, the applicant admitted during his adjustment of status interview that he worked for [REDACTED] and lived in the State of Maryland. The district director asserted that, although the applicant was working for the same employer on the Form ETA 750, he was not employed in the area of intended employment, which is Waltham, Massachusetts. The district director concluded that the Form ETA 750 was no longer valid. The district director provided the applicant a 30-day period in which to submit any evidence in rebuttal to the Notice of Intent to Deny.

In response, counsel asserted, [REDACTED] has now offered [the applicant] a position as a Software Engineer working in various locations throughout the United States.” Counsel asserted that the applicant’s job duties were the same or similar to the job duties listed on the Form ETA 750. According to counsel, the applicant was legally able to work in a similar job for the same employer pursuant to section 106(c) of the *American Competitiveness in the Twenty-first Century Act of 2000* (AC21). Counsel stated:

AC21 has changed the rules pertaining to the labor certification and the area of intended employment. If the I-485 remains pending and adjudicated for over 180 days by the Service, the foreign national is no longer subject to any of the restrictions under the labor certification pertaining to having work in Waltham, Massachusetts. The employer may choose to offer [the applicant] a new or different position that requires travel, anywhere in the U.S. Even if [the applicant] had found a new employer, as long as his job duties were “same or similar,” the Service is required to approve the I-485 application. . . .

The district director was not persuaded by counsel’s assertions and he denied the application. In replying to counsel’s assertions regarding the applicability of section 106(c) of AC21, the district director stated:

[Y]ou informed the interviewing officer that you report to work at . . . Beltsville [sic], MD. However, according to the Labor Certification filed on your behalf by NetGuru, Inc., you should be working at . . . Waltham, Massachusetts and residing in Massachusetts too You failed to submit any evidence from [REDACTED] suggesting that they have offered you a position as a Software Engineer “working in various locations throughout the United States.” It is correct that you are permitted to change employers as long as the new job is in the same or a similar occupational classification as the job for which the petition was filed. However, you are still working for NetGuru Systems, Inc. as a Software Engineer[;] thus, it is not a “new job” or a “new employer,” and your duties have remained the same. As such, you are subject to the provisions highlighted in the labor certification: the area of intended employment for you is in Waltham, Massachusetts, not in Beltsville, Maryland

...

Again, you are working for the petitioner; you do not have a “new job,” therefore AC21 § 106(c) does not apply to you and you are bound to [sic] the provisions of the labor certification. You are subject to the provisions outlined in the labor certification, specifically that you are to be residing and working in Waltham, Massachusetts. However, the records of

the Service reflect you have never worked for NetGuru Systems, Inc. in Waltham, Massachusetts, or resided in Waltham, Massachusetts.

(Emphasis in original.) The district director asserted that the provisions of AC21 would have been applicable “if [the applicant] had resided and worked in Massachusetts, then subsequently filed Form I-485 180 days later and . . . received a job offer in Maryland and moved.”

Finally, the district director noted in the certification notice that the applicant’s address on the Form ETA 750 was not included on the Form G325-A, Biographic Information. The district director asserted further that, when filing the Form ETA 750, the applicant was residing in Maryland, not Massachusetts.

The district director’s conclusions regarding the applicability of section 106(c) of AC21 to the facts in this matter were erroneous. The provisions of section 106(c) of AC21 were incorporated at section 204(j) of the Act, 8 U.S.C. § 1154(j), which states:

JOB FLEXIBILITY FOR LONG DELAYED APPLICANTS FOR ADJUSTMENT OF STATUS TO PERMANENT RESIDENCE- A petition under subsection (a)(1)(D) [since redesignated section 204(a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

Section 212(a)(5)(A)(iv) of the Act, 8 U.S.C. § 1182(a)(5)(A)(iv), states further:

LONG DELAYED ADJUSTMENT APPLICANTS- A certification made under clause (i) with respect to an individual whose petition is covered by section 204(j) shall remain valid with respect to a new job accepted by the individual after the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the certification was issued.

The district director claims that the applicant does not qualify under the provisions of sections 204(j) and 212(a)(5)(A)(iv) of the Act because the applicant’s job in Maryland is with the same employer and has the same title and duties as the job listed on the Form ETA 750. The AAO notes, however, that the purpose of section 106(c) of AC21 is to allow certain adjustment applicants the flexibility to seek a new job in the same or similar occupational field due to lengthy delays in adjudicating adjustment applications. Essentially, section 106(c) of AC21 allows the individual to either change jobs within the same employer’s operations or to move to a new employer as long as the job is in the same or similar occupational field.

The district director’s interpretation of sections 204(j) and 212(a)(5)(A)(iv) of the Act is unduly restrictive. The district director emphasized that the applicant never worked for [REDACTED] in Waltham, Massachusetts, which is the location of the job on the Form ETA 750. However, an August 4, 2003 CIS memorandum states specifically, “It should be noted that there is no requirement in statute or regulations that a beneficiary of a Form I-140 actually be in the underlying employment until permanent residence is

authorized.”² Because a Form ETA 750 is an offer of prospective employment, an alien is not required to work for the sponsoring employer until he adjusts his status to that of a lawful permanent resident. The fact that the applicant did not work in Waltham, Massachusetts is irrelevant to his eligibility to derive a benefit under section 106(c) of AC21.

The AAO now turns to the district director’s assertion that the beneficiary’s job in Maryland is not “new” because it has the same title and the same job duties as described on the Form ETA 750. Sections 204(j) and 212(a)(5)(A)(iv) of the Act each state that its provisions apply if the alien changes jobs or employers as long as the new job is “in the same or a similar occupational classification as the job for which the petition was filed.” Thus, the mere changing of a job with the same employer would constitute a “new job” under the statutory language, as long as the new job is in the same or similar occupational classification.

In the matter before the AAO, the applicant’s prospective employer remains the same, as do the job title and the job duties. However, the location of the applicant’s prospective job changed from Waltham, Massachusetts to “various locations throughout the United States.” Although its location is unknown, the applicant’s current job would be considered a new job simply because it is no longer in Waltham, Massachusetts. Even if the employer remains the same, an alien is considered to have obtained a “new job” if, for example, the alien has been promoted within the same company, or the alien’s job has been relocated to another city within the United States, as long as the job is in the same or similar occupational field. Because the intent of section 106(c) of AC21 is to allow both an employer and an alien the flexibility to seek out new employment opportunities, it would be inconsistent with the intent of the law to interpret the term “new job” as applying only if the alien finds a different employer, or if the alien obtains a new job title and a different set of responsibilities with the same employer. A change in the location of the alien’s employment constitutes a new job as long as the job is in the same or similar occupational classification as the alien’s previous job. Accordingly, the district director’s basis for denying the adjustment applicant was incorrect, and his decision must be withdrawn.

Despite the withdrawal of the district director’s decision, the application cannot be approved. As shall be discussed, there is sufficient evidence in the record to question whether the applicant may have violated the terms and conditions of his nonimmigrant status and, therefore, would be ineligible to adjust his status.

Pursuant to 8 C.F.R. § 245.1(b)(10), any alien who was ever employed in the United States without the authorization of Citizenship and Immigration Services (CIS), or who has otherwise at any time violated the terms of his admission to the United States as a nonimmigrant, may not adjust to lawful permanent resident status.

The record contains two Form I-797 Approval Notices, which indicate that the beneficiary began working for the NetGuru Systems, Inc. in the United States as an H-1B nonimmigrant worker in 1998. According to the Form G-325A that the applicant submitted in conjunction with his Form I-485, the applicant began residing in the United States in December 1998, and has resided in the following cities:

- Durham, North Carolina 12/1998 – 12/1999

² Memorandum from William R. Yates, BCIS Acting Associate Director for Operations, *Continuing Validity of Form I-140 Petition in accordance with Section 106(c) of the American Competitiveness in the Twenty-First Century Act of 2000 (AC 21) (AD03-16) HQBCIS 70/6.2.8 – P* (August 4, 2003)

- Beltsville, Maryland

12/1999 - Present³

The applicant also indicated on the Form G-325A that, since his arrival in the United States, he has been working only for [REDACTED] the petitioner of the Form I-140.

The AAO notes that documentation in the record belies the applicant's claimed places of residence on the Form G-325A. When the petitioner filed the Form ETA 750 with the Department of Labor on October 24, 2000, and when it filed the I-140 petition with CIS on June 19, 2001, the petitioner indicated on each document that the applicant was living in Waltham, Massachusetts. However, according to the G-325A and copies of the applicant's W-2 forms for the 1998 – 2001 years, the applicant never lived in Massachusetts; he was living either in North Carolina or Maryland when the petitioner filed both the ETA 750 and the I-140 petition.

In addition, at the time of the applicant's adjustment interview in September 2002, he presented payroll records from August 23, 2002; September 6, 2002; and September 20, 2002. Each record listed the applicant's address in Torrance, California. Although the payroll records do not contradict information in the Form G-325A because they were created after the applicant completed the form, they, along with the other documents, raise questions concerning the applicant's employment history. It is not evident where exactly the beneficiary has been working in the United States for NetGuru Systems, Inc. since his entry in 1998. Of particular concern is counsel's statement in reply to the director's Notice of Intent to Deny in which he states that the applicant has been offered a new position as a software engineer "working in various locations throughout the United States." This statement, along with the documentary evidence described previously, indicates that the applicant may have violated the terms of his H-1B nonimmigrant status by working in locations for the petitioner that were not covered by a Labor Condition Application (LCA).

Pursuant to 8 C.F.R. § 214.2(h)(2)(i)(E):

The petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition. An amended or new H-1C, H-1B, H-2A, or H-2B petition must be accompanied by a current or new Department of Labor determination. In the case of an H-1B petition, this requirement includes a new labor condition application.

Furthermore, 8 C.F.R. § 214.2(h)(2)(i)(B) states:

Service or training in more than one location. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

³ The term "present" in this context refers to the filing date of the Form I-485, which is January 22, 2002.

The AAO notes that the record before it does not contain any of the documents submitted to the service center in conjunction with the initial H-1B petition and the petition for an extension of the applicant's stay. If, however, the applicant has been working for the petitioner in various locations throughout the United States as counsel claimed, and these locations are not covered by any of the LCAs that the petitioner had obtained from the Department of Labor, then the applicant would have violated the terms of his nonimmigrant status. As the regulation makes clear, any material change in the terms or conditions of an alien's employment requires the petitioner to file a new or amended petition with a valid LCA. Any change in the applicant's place of employment would constitute a material change in the terms and conditions of employment, even if the applicant would be working in the same type of position. In addition, any services that the beneficiary would perform for the petitioner in more than one location would need to be specified in an itinerary that accompanied the I-129 petition.

The district director never addressed this issue in either the denial letter or the notice of certification. The district director, therefore, must afford the applicant reasonable time to provide evidence pertinent to the issue of his employment in the United States. In particular, the applicant must explain the discrepancies in the addresses that are listed on the Form ETA 750, the Form I-140, the Form G-325A, and the payroll records. The applicant must also submit evidence to establish that his employment for the petitioner has not violated the terms and conditions of his H-1B status. The district director shall then render a new decision based on the evidence of record as it relates to the regulatory requirements for eligibility. As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

The AAO notes that if the applicant is able to establish that he did not violate the terms and conditions of his nonimmigrant status, he would be eligible to adjust his status, if otherwise admissible.

ORDER: The district director's April 29, 2003 decision is withdrawn. The matter is remanded to the district director for entry of a new decision, which if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.